IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2)(b)
Description of case

Date of decision: 19.02.2007

Criminal Reference No. 02 of 2006

ALONGWITH

Criminal Appeal No. 181 of 2006

A.F.R. (Approved for Reporting)
Not approved for reporting

(Initial of Judge)

Date: 19.02.207

Note: Bench Reader will attach this at the top of first page of the judgment when it is put up before the Judge for signature.

Judgment Reserved

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Reference No. 02 of 2006

State

Vs.

Kundan Dayal
S/o Sri Naryan Ram Das
R/o Village Bankhola, Hospital Road
Bageshwar, District Bageshwar …..Convict.

Sri A. Rab, Additional Government Advocate for the State.
Shri Vinod Nautiyal, learned counsel for the convict.

ALONGWITH

Criminal Appeal No. 181 of 2006

Kundan Dayal
S/o Sri Narayan Ram Das
R/o Village Bankhola, Hospital Road
Bageshwar
District Bageshwar ……..Appellant (In Jail).

Vs.

State …..….Respondent

Shri Vinod Nautiyal, learned counsel for the appellant/convict.
Sri A. Rab, Additional Government Advocate for the State.

Coram: Hon'ble Prafulla C. Pant, J.
Hon'ble Dharam Veer, J.

Per: Hon'ble Prafulla C. Pant, J.

This reference has been made by learned Sessions Judge, Bageshwar under Section 366 of Code of Criminal Procedure, 1973 (herein-after for brevity referred as Cr.P.C.), for confirmation of

Sentence of death, passed by said court against the convict Kundan Dayal. An appeal has also been preferred by the convict under Section 374 (2) of Cr.P.C. against the judgment and order dated 12.07.2006, passed by learned Sessions Judge, Bageshwar in Sessions Trial No. 09 of 2006, whereby the appellant Kundan Dayal has been convicted under Section 302 of Indian Penal Code, 1860 (herein after referred as I.P.C.) and sentenced to death. Both, the reference and the appeal were heard together and are being disposed of by this judgment.

2. We have heard learned counsel for the parties and perused the entire record of the trial court.

3. **Prosecution Story:-** Prosecution story, in brief, is that on 15.02.2006, at about 3:45 P.M., Ramesh Lal Jauhri (deceased), Chairman of Nagar Palika Parishad (Municipal Board), Bageshwar was discharging his duties in his office. At that point of time, P.W. 1 Diwan Singh Taragi, Executive Officer of the Municipal Board was with him. Appellant Kundan Dayal, armed with knife, entered in the chamber of the Chairman and told that he had personal work with him. He asked P.W. 1 Diwan Singh Taragi to go out of the room. As soon as, P.W. 1 Diwan Singh Taragi went out of the chamber of the Chairman, appellant Kundan Dayal, assaulted Ramesh Lal Jauhri, the Chairman

of the Municipal Board and started giving blows with the knife. On hearing cries of Shri Ramesh Lal Jauhri (deceased), P.W. 1 Diwan Singh Taragi and other members of the staff of the office, rushed towards the room of the Chairman. Appellant Kundan Dayal after causing injuries on the person of Ramesh Lal Jahhri went out of the room threatening the witnesses with the knife he possessed. Shri Ramesh Lal was immediately taken to the hospital, in Municipal Board's official vehicle registration No. U.P. 28/0332. However, in the hospital the injured was declared dead at about 4:30 P.M. The First Information Report (Ext. A-1) of the incident was lodged on the very day i.e. 15.02.2006, by P.W. 1 Diwan Singh Taragi, Executive Officer of Municipal Board, at about 5:00 P.M. with police station Kotwali, Bageshwar. On the basis of which crime No. 80 of 2006 was registered against accused Kundan Dayal relating to offence punishable under Section 302 I.P.C. Accused/appellant Kundal Dayal (along with the knife, which he used in the crime), was arrested by the police on the very day i.e. 15.02.2006, near old post office, Bageshwar. The crime was investigated by P.W. 9 Bachan Singh Rana, Inspector of Police. The dead body of the deceased was taken into custody by the police from the hospital and inquest report (Ext. A-4) was prepared. Police also prepared police form No. 13 (Ext. A-8), sketch of the dead body (Ext. A-9), sample seal

(Ext. A-11) and letter (Ext. A-12) addressed to Chief Medical Officer, Bageshwar, requesting him to get conducted the post mortem examination of the deceased.

4. **Ante mortem injuries** :- A term of three doctors namely, Dr. Khempal (P.W. 5), Dr. Jitendra Bhatt and Dr. S. Ram, conducted post mortem examination on next day i.e. 16.02.2006, at about 9:00 A.M. and found following ante mortem injuries on the person of the deceased:-

1. **Stab wound size about 2cm X 1cm X 4cm deep, over the left front of chest about 2cm above left nipple.**
2. **Stab wound size about 3 cm X 1cm X 4cm deep, over the left side front of chest, about 1 cm below the left nipple.**
3. **Multiple stab wounds measuring about 3cm X 1cm X deep to muscle, over the left side anterior chest, four in numbers.**
4. **Stab wound size about 3cm X 1cm X deep to muscle, over right side chest lateral aspect, about 6cm below right axilla.**
5. **Incised and stab wounds three in number around umblicle and lower abdomen.**

6. **Stab wound size about 3cm X 1cm X deep to muscle, over the right mid forearm on the exterior aspect.**
7. **Incised wound size about 2cm X .5cm over the right side forehead.**
8. **Stab wound size about 4cm X 1cm, deep to muscle over right shoulder blade.**
9. **Stab wound size about 2cm X 1cm, deep to muscle, over the left side chest medial side of left shoulder blade.**

The doctors, who performed autopsy, prepared post mortem examination report (Ext. A-2). It was opined by them that cause of death was cardio respiratory arrest due to haemorrhage.

5. **Investigation, committal and trial:-** The Investigating Officer during investigation inspected the spot and prepared the site plan (Ext. A-13) and took into its possession the blood stained pieces of mat and 'BAJRI' (gravel) from the place of incident and a memo (Ext. A-14) was prepared. The blood stained articles and the knife (Ext. 1) recovered, were sent to the Forensic Lab for examination from where report (Ext. A-23) was received, wherein it was reported that three blood stained articles including the knife, contained

human blood of Group B. After interrogating the witnesses named in the First Information Report including Naveen Chandra Adhikari, Hayat Singh Smt. Heema Karmiyal and others, the Investigating Officer submitted the charge sheet against the accused/appellant Kundan Dayal for his trial relating to offence punishable under Section 302 I.P.C.

6. The Magistrate, on receipt of charge sheet after giving necessary copies to the accused, committed the case to the Court of Sessions. Learned Sessions Judge after hearing the parties framed charge of offence punishable under Section 302 I.P.C. against the accused Kundan Dayal on 18.04.2006. The accused denied the charge and claimed to be tried. On this, prosecution got examined P.W. 1 Diwan Singh Taragi (eye-witness and the informant), P.W. 2 Naveen Chandra Adhikari (eye witness), a Clerk of Nagar Palika Parishad, Bageshwar, P.W. 3 Hayat Singh Parihar (eye-witness), a licensed Clerk in the office of the Municipal Board, P.W. 4 Smt. Hema Karmiyal (eye-witness), a Clerk in the office of the Board, P.W. 5 Dr. Khempal, who is one of the members of the team who conducted post mortem examination, P.W. 6 Balwant Singh (a witness of the inquest report), P.W. 7 Sub-Inspector Arvind Kumar, who arrested the accused Kundan Dayal soon after the incident and recovered the knife (Ext. 1) from the

possession of the accused and prepared memo (Ext. A-5), P.W. 8 Sompal, a witness of collection of blood stained pieces of mat and BAJRI from the place of the incident, P.W. 9 Bachan Singh Rana (Investigating Officer), Inspector of Police and P.W. 10 Constable Pooran Chand, who recorded the First Information Report and prepared the check report (Ext. A-17). The entire oral and documentary evidence was put to the accused under Section 313 of Cr.P.C. in reply to which he alleged that the prosecution evidence against him is false. No evidence in defence was adduced by the accused/appellant. However, a plea was taken at the end of the trial that accused is mentally unwell. Learned Sessions Judge, Bageshwar, after hearing the parties found accused Kundan Dayal guilty of charge of offence punishable under Section 302 I.P.C. The trial court thereafter heard the parties on the point of sentence and awarded sentence of death against the appellant Kundan Dayal and sent the record to this Court for confirmation of death sentence.

7. **Prompt First Information Report:-** On examination of the evidence on record, we found that the First Information Report lodged with the police is a prompt one. The incident has taken place at about 3:45 P.M. on 15.02.2006. Immediately after the incident the injured was rushed to the hospital where he succumbed to the

injuries at about 4:30 P.M. And the First Information Report has been lodged at about 5:00 P.M. on that very day. The distance between the police station and the place of incident is 1 Km. The scribe of the report must have taken some time in writing the report (Ext. A-1). As such, the report lodged with the police is within half-an-hour of the death. The First Information Report (Ext. A-1) has been proved by P.W. 1 Diwan Singh Taragi and check report (of the First Information Report) (Ext. A-17), has been proved by P.W. 10 Constable Puran Chand.

8. **Immediate arrest and recovery of the weapon:-** From the statement of the prosecution witnesses, it has come on record that accused/appellant Kundan Dayal after commission of crime went from the place of occurrence threatening the witnesses with knife. However, he appears to have been arrested on that very day after the incident along with the knife used in the crime. P.W. 7 Sub-Inspector Arvind Kumar has stated on oath that on 15.02.2006, when he along with Constable Devendra Singh was on a traffic checking duty, he came to know that Shri Ramesh Lal Jauhari, Chairman of the Nagar Palika Parishad, has been murdered by Kundan Dayal. When this witness along with his associate Devendra Singh, reached near old post office, he heard people saying – 'PAKRO! PAKRO!"

(Apprehend! Apprehend!). And when he looked towards the side from where the voice was coming, he saw a person running towards Khari Bazar. He immediately with the help of Constable Devendra Singh apprehended the person running, who disclosed his name Kundan Dayal. P.W. 7 S.I. Arvind Kumar, has further stated that Kundan Dayal was armed with a blood stained knife. At the time of his arrest, the knife (Ext. 1), used in the crime, was taken into possession by the police and a recovery memo (Ext. A-5) and prepared. Memorandum of arrest (Ext. A-6) was also prepared. The document- Memo Ext. A-5, shows that the accused Kundan Dayal was arrested at 5:30 P.M. on the very day of the incident and at the time of the arrest, blood stained knife was recovered from him.

9. **Report of Forensic Lab:-** Report of Forensic Lab (Ext. A-23), shows that the knife contained human blood of Group-B. The report of the Forensic Lab (Ext. A-23), further discloses that the blood stained clothe i.e. undershirt of deceased and a blood-stained piece of mat, recovered from the place of incident, also contained human blood of Group-B.

10. **Evidence of eye-witnesses of the incident:-** P.W. 1 Diwan Singh Taragi is an Executive Officer of Municipal Board, Bageshwar who has stated that

at the time when accused Kundan Dayal entered in the chamber of Ramesh Lal Jauhari (deceased), he was with him (deceased). On being asked by accused Kundan Dayal that he wants to have some personal talk with the Chairman, he left the room. The witness further states that as soon as he came out of the room, he heard shrieks from the chamber of the Chairman and saw that accused Kundan Dayal is assaulting with the knife on the person of Ramesh Lal (deceased). P.W. 1 Diwan Singh Taragi further states that he called other members of the staff of the office, who also came there and saw accused with the knife coming out of the chamber. The statement of P.W. 1 Diwan Singh Taragi gets corroboration from the statement of P.W. 2 Naveen Chandra Adhikari, a Clerk of Nagar Palika Parishad, P.W. 3 Hayat Singh Parihar, license Clerk of Municipal Board and P.W. 4 Smt. Hema Karmiyal, another Clerk in the same office. All these three witnesses have stated on oath that on 15.02.2006, at about 3:45 P.M. they heard shrieks from the chamber of the Chairman of Municipal Board and rushed towards that room. Each of these witnesses have stated that they saw from a window Kundan Dayal, assaulting with the knife on the person of Ramesh Lal Jauhri (deceased). Presence of all the four eye-witnesses is natural and their testimony is trust worthy. The witnesses have further states that accused left the place, threatening them with knife.

11. **Corroboration from Post Mortem Examination Report:-** We have already mentioned the ante mortem injuries found on the person of the deceased at the time of post mortem examination, which are recorded in the report (Ext. A-2). All the nine injuries recorded in the post mortem examination report, were stab wounds, or incised wounds which according to P.W. 5 Dr. Khempal could have been caused by the sharp edged pointed weapon like knife. In the post mortem report, it is also mentioned that pleura of the deceased, both the lungs, pericardium and heart were found punctured. Apart from this, abdomen wall was also found punctured. All this clearly indicates that the person who assaulted the deceased had an intention to kill him. The post mortem examination read with the statement of P.W. 5 Dr. Khempal, shows that the autopsy was done by the team of three doctors, namely Dr. Khempal, Dr. Jitendra Bhatt and Dr. S. Ram. The post mortem examination report (Ext. A-2) further discloses that when autopsy was done on 16.02.2006 at 9:00 A.M. rigor morits was present all over the body.

12. **Arguments advanced on behalf of the appellant/convict and discussion thereon:-** Learned counsel for the appellant argued that accused (appellant) was not given proper

opportunity to defend himself through a lawyer of his choice. In this connection, he drew attention of this Court to the provisions of 303 and 304 of Cr.P.C. Section 302 of Cr.P.C., provides that any person accused of an offence before a criminal court or against whom proceedings are instituted under this Code, may of right be defended by a pleader of this choice. Section 304 provides that where a accused is not represented by a pleader, the court shall provide him a pleader to defend him at the expense of the State. From the perusal of the lower court record, it appears that Sri Hari Om Bhakuni, an advocate, was appointed as a pleader at the State expense by the trial court so that the accused may be defended as he was not represented by any pleader. Statements of the witnesses examined on behalf of the prosecution, clearly show that each of the witnesses has been cross examined by said pleader to defend the accused. As such, we are unable to accept the submission of learned counsel for the appellant that the accused was prevented from defending through a lawyer of his choice.

13. Next submission advanced on behalf of the appellant is that the accused Kundan Dayal was mentally unwell and no opportunity was given to him to adduce evidence on that point in his defence. Attention of this Court was drawn to the provision of Section 84 of I.P.C., which provides

that noting is offence, and is done by a person, who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. In our considered opinion unsoundness of mind is something different that simply being mentally unwell. Defence under Section 84 I.P.C. is available to the persons of unsound mind and not for every psychiatric problem. When the accused was examined under Section 313 of Cr.P.C. and the prosecution evidence was put to him, he has replied every question as a normal person and in his defence, it has been alleged that evidence adduced against him is false. At the end of that examination when he was asked whether he would like to adduce evidence in defence, accused Kundan Dayal, has simply said "कागज़ देने है। आज मेरी तबयत खराब है। मै कोई दवाई नहीं खाता हूँ।" (I have to file papers. Today I am unwell. I do not take any drugs). From the record it cannot be said that the accused has taken plea of unsoundness of mind. As far as the opportunity of adducing the evidence in defence is concerned, the record does reveal that opportunity was given but no evidence in defence was adduced. Learned counsel for the appellant drew attention of this Court to application 31-A, moved before the trial court at the end of the trial, alleging that accused is a poor man and he is mentally unwell since 1999. It is further mentioned

in that application that the accused has got treatment from several institutions of mental health and accused should be medically examined, as to his mental condition. The trial court after hearing the parties, rejected the application, holding that application is simply moved to linger the trial and the plea of mental illness and the documents relating thereto have only been filed to bring on record at the end of trial without taking any plea earlier relating to unsoundness of mind. The trial court was in a best position to judge the conduct of the accused in the court, and if it did not find his conduct to be that of unsound person, we have no reason to disagree with the trial court particularly in view of the facts, evidence and circumstances discussed in preceding paras. It is also mentioned in the order dated 12.07.2006, whereby application No. 31-A of the accused is rejected, that accused is facing another trial at Lucknow since 1999 and the documents are procured as an after thought since then. We do not see any illegality in the order passed by the trial court as what is important in the criminal trial is that the unsoundness of the mind is to be examined at the time of commission of crime and not occasional mental illness. Mental obsession, not amounting to insanity is not covered under the definition of unsoundness of mind for the purpose of Section 84 of I.P.C. (Reliance placed on principle of law laid down in ***Gopalan Nair Vs.***

The State of Kerela (1973) 1 Supreme Court Cases 469.

14. The third contention submitted by Shri Vinod Nautiyal, learned counsel for the appellant is that the trial court in its impugned judgment, has mentioned certain facts, which are not on record e.g. observation as to the motive of commission of murder that it was to prevent the deceased to get ticket for next Legislative Assembly election. On close scrutiny of the record, we found that this submission is correct, as no evidence has been recorded by the trial court on this point and it appears to have been simply gathered from oral submissions or might be from some newspaper reports. But in our opinion that by itself is not sufficient to discard the oral testimony of the natural eye-witnesses, who have seen commission of crime in a day light.

15. Shri Vinod Nautiyal, learned counsel for the appellant, drew attention of this Court to the principle of law laid down in ***Sharad Birdhichand Sarda Vs. State of Maharashtra (1984) 4 Surpeme Court Cases 116*** and also the one in ***Durga Doma Vs. State of M.P. (2002) 10 Supreme Court Cases 193.*** Relying on the aforesaid two cases, it is argued that it cannot be said that the charge is proved against accused beyond reasonable doubt as against the accused was mentally ill and the

accused should have been given benefit of reasonable doubt. After going through the aforesaid mentioned case laws, we are unable to accept the submission of the learned counsel for the appellant for the reason that in the case of ***Sharad Birdhichand Sarda (Supra),*** it was a case, the charge of circumstantial evidence while the present case, the charge of which the accused has been found guilty is a case of direct evidence and as many as four eye-witnesses, have seen and deposed on the day light incident. Similarly, in the case of ***Durga Domar (Supra),*** the accused has not been acquitted of the charge by the Apex Court and simply a report has been sought from the Medical Officer, as to the mental condition of the accused and that too in a different circumstances when the accused has killed his own kiths and kins i.e. five children, who were his own close relatives. In the present case, it is not so and the case of Durga Domar, cannot be applied to the present facts of the case.

16. Our attention is also drawn on behalf of the appellant to the principle of law laid down in ***Anjlus Dungdung Vs. State of Jharkhand (2005) 9 Supreme Court Cases 765 and Narendra Singh Vs. State of M.P. (2004) 10 Supreme Court Cases 699*** and contended that suspicion howsoever strong cannot take place of proof. We are in agreement with the above principle of law but the present case

is not a case of suspicion, rather it is a case of direct evidence of four natural eye-witnesses, who have seen accused committing murder of the deceased in a day light at a public place (office).

17. **<u>On the point of sentence:-</u>** On behalf of the learned counsel for the appellant/convict, it is argued that even if the charge of offence punishable under Section 302 I.P.C. is taken to have been proved, it is not the 'rarest of the rare' case, which requires capital sentence. On the other hand, Shri A. Rab, learned Additional Advocate General contended that the murder committed by the accused Kundan Dayal is a brutal one in which a public representative has been killed. Having heard learned counsel for the parties and keeping in view the principle of law laid down by the Apex Court in various cases, we are of the view that though the commission of murder is a brutal one but it is not a fit case for awarding sentence of death to the convict, particularly in view of the fact that the accused has taken a plea that he was mentally unwell since 1999. Our view gets support from the principle of law laid down in ***Gopalan Nair Vs. State of Kerela (1973) 1 Supreme Court Cases 469,*** in which Apex Court has opined that where the accused had some sort of mental trouble prior to the date of occurrence and there was nothing to shows that he was not suffering from a mental obsession which may not amount to insanity but

which would affect a person's mind in a way quite different from that of a normal person, the extreme penalty of death should not be inflicted and sentence of life imprisonment would meet the ends of justice.

18. It is also contended on behalf of the appellant by his learned counsel that even if the prosecution story is believed, only an offence under Section 304 I.P.C. is made out and not the one punishable under Section 302 I.P.C. To elaborate this contention, it is submitted by him that the incident appears to be a sudden one. After going through the evidence on record, we find little substance in the contention for the reason that the culpable homicide committed by the accused appears to be premeditated that is why he, armed with a knife has entered in the chamber of Shri Ramesh Lal Jahuri (deceased). There is no iota of evidence on record to show that any grave or sudden provocation was given to the accused before he started assaulting the deceased with knife.

19. **Conclusion:-** For the reasons, as discussed above, we are of the view that the trial court has committed neither any error of law or that of fact in recording conviction of the accused Kundan Dayal relating to offence punishable under Section 302 I.P.C., as the charge against the accused is proved from the evidence on record but on the sentence

awarded to the convict, we feel that sentence of imprisonment for life would meet the ends of justice. Therefore, the death sentence awarded by the trial court cannot be confirmed and the same is set aside. We hereby direct that the convict Kundan Dayal is sentenced to imprisonment for life instead of sentence of death. Accordingly, the reference made by the learned Sessions Judge, Bageshwar, stands replied. For the reasons, we have discussed earlier in this judgment, the appeal filed by the convict is liable to be dismissed on the point of conviction but deserves to be allowed to the extent of reduction in sentence, as mentioned above. Accordingly, the appeal also stands disposed of. Send the lower court record back to the trial court to make the convict serve out the sentence of imprisonment for life.

(Dharam Veer, J.) **(Prafulla C. Pant, J.)**

Dt: 19.02.2007
Sweta